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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON, CALIFORNIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF CALIFORNIA

BRIEF OF NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF APPELLE CITY OF TIBURON

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INDEX

Page

INTEREST OF THE AMICUS CURIAE..... 1
STATEMENT OF THE CASE 3
ARGUMENT 5
I. The Demand for Good Land Use Regulation Supports the Elimination of Inverse Condemnation as a Remedy 6
A. The Threat of Suits for Damages Under Inverse Condemnation Would Deter Efficient Land Use Planning..... 7
B. Excessive Financial Pressure Would Be Exerted Upon Municipalities By Even the Threat of Frivolous Inverse Condemnation Litigation..... 9
II. The Fifth Amendment Does Not Require Inverse Condemnation As A Remedy 13
CONCLUSION 15

CITATIONS

Page

Cases:

Associated Home Builders v. *City of Walnut Creek*, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 15

Berman v. *Parker*, 348 U.S. 26 8

Candlestick Properties, Inc. v. *San Francisco Bay Conservation & Dev. Comm'n.*, 11 Cal.App.3d 557, 89 Cal. Rptr. 897.....15

Eldridge v. *City of Palo Alto*,
57 Cal.App.3d 637, 129 Cal.Rptr. 575 10

Ellis v. *City of West University Place*,
141 Tex. 608, 175 S.W.2d 396..... 7

Euclid v. *Ambler Realty Co.*,
272 U.S. 365 8

Fred F. French Investing Co., Inc. v. *City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed*, 429 U.S. 990 13

Gaebel v. *Thornbury Township*,
8 Pa.Commw. 399, 303 A.2d 57.....14

Gisler v. *County of Madera*,
38 Cal.App.3d 303, 112 Cal.Rptr. 919 15

Graver Mfg. Co. v. *Linde Co.*,
336 U.S. 271 6

Just v. *Marinette County*,
56 Wis.2d 7, 201 N.W.2d 761 15

Mailman Dev. Corp. v. *City of Hollywood*,
286 So.2d 614 14

Scrutton v. *County of Sacramento*,
275 Cal.App.2d 412, 79 Cal.Rptr. 872 14

Selby Realty Co. v. *City of San Buenaventura*,
10 Cal.3d 110, 514 P.2d 111, 109 Cal.Rptr. 799 8

Sibson v. *State*,
115 N.H. 124, 336 A.2d 239 15

State v. *Superior Court*,
12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 14,15

Sutfin v. *State*,
261 Cal.App.2d 50, 67 Cal.Rptr. 665 12

Turnpike Realty Co. v. *Town of Dedham*,
362 Mass. 221, 284 N.E.2d 891, *cert. denied*,
409 U.S. 1108 14

Union Oil Co. of California v. *Morton*,
512 F.2d 743 14

United States v. *Finn*,
127 F.Supp. 158 (S.D.Cal), *modified*, 239 F.2d 679.....12

Village of Belle Terre v. *Boraas*,
416 U.S. 1.....15

Miscellaneous:

Beuscher, Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation, 1 Urb.L.Ann. 1 (1968).....8

Brief of Amici Curiae for the City of Cerritos at 25, *HFH, Ltd.* v. *Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 10

Cabaniss, Inverse Condemnation in Texas—Exploring the Serbonian Bog, 44 Tex.L.Rev. 1584 (1966).....7,12

Comment, 38 Wash.L.Rev. 607 (1973) 12

Comment, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan.L.Rev. 1438 (1974) 8

Comment, "Takings" under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 Sw.L.J. 723 (1976).....7,10

Hall, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 Hastings L.J. 1569 (1977) 7,8,12

Kanner, The Consequences of Taking Property by Regulation, 24 Prac.Law. (No.3) 65 (1978).....11

Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis.L.Rev. 3.....12

Note, 66 Harv.L.Rev. 1134 (1953) 12
5 Williams, American Land Planning Law, §159.18 (1975) 10
Work, KO'd by Zoning: Who Pays?, National Law Journal, Jan. 28, 1980 4,10

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 42 of this Court, the National Institute of Municipal Law Officers (NIMLO) respectfully submits this

brief as amicus curiae in support of appellee, City of Tiburon. NIMLO is an organization composed entirely of municipalities who are political subdivisions of states. Founded in 1935, it now has a membership of over 1500 municipalities located in all 50 states and the District of Columbia. Each member municipality participates through its chief legal officer, usually designated as city attorney, corporation counsel, city counselor, etc., and the chief legal officer's assistants.

As the legal officers of their cities, those who operate NIMLO for their municipalities defend city planning and zoning decisions in actions for declaratory and injunctive relief. The availability of these actions to landowners was not curtailed by the decision below, and NIMLO does not urge any restriction on the availability of these actions. Rather, NIMLO argues that the threat—even in cases as frivolous as the record here reveals this case to be—of an action for damages will inhibit rational and vigorous land use decisionmaking by local government officials and thus damage the public interest.

NIMLO believes that if the opinion of the California Supreme Court below is left standing, it will allow local governments to properly enact land use decisions to guide the physical development of their jurisdictions and to preserve and improve the quality of life for their citizens, and at the same time protect property owners from unconstitutional infringement of their property rights by retaining the right to invalidate excessive legal regulations by declaratory and injunctive actions.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

The Agins, appellants here, own five acres of land in Marin County, California, which they acquired for the purpose of development. (App. 4). They described the area as "the most desirable place to live in the State of California . . . resulting in the highest land value per acre for suburban areas in the State of California." (*Ibid*).

Appellants claimed (App. 6) that a 1973 ordinance of the City of Tiburon, allowing them to build and sell up to five houses on their land (see J.S. App. 3), was confiscatory and entitled them to $2 million in damages (App. 11, 14). The Agins never have attempted to improve their property (J.S. App. 3). Nor, perforce, have they sought approval for development from the City of Tiburon, "nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land." (J.S. App. 3).

The Agins filed a claim for $2 million in damages against Tiburon in 1973 (J.S. App. 4) and perfected that claim by filing this case in 1975. (*Ibid.*).[1] The gravamen of the Agins' complaint was that the City's ordinance, permitting them to build five houses "had completely destroyed the value of their property." (J.S. App. 4).

The record in this case does not reflect the value of the Agins' land under the Tiburon ordinance. An article on the

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[1]Therefore, the aborted attempt of Tiburon to pursue a condemnation remedy from late 1973 (after the Agins' claim has been filed) until late 1974 (before the Agins' suit had been filed) (J.S.App. 4) is irrelevant both to the disposition of this suit and to the admitted motivation of the Agins in bringing it.

case in a legal newspaper,[2] describes values of $225,000 per acre, for land alone, in Tiburon. At this rate, the ordinance permits the Agins to realize at least $1.12 million on the sale of their property for lots.

The complaint was in two counts: first for damages, second for declaratory relief. The trial court held that the claim for declaratory relief failed to allege facts sufficient to state a cause of action for, *inter alia*, "the unreasonable restriction of the Agins' use and enjoyment of their property." (App. 12). Although the court gave the Agins leave to amend this claim (J.S. App. 5), they have declined to do so. (Br. 8).

The count praying $2 million damages was also dismissed, this without leave to amend. The only issue on appeal is whether the damages claim should survive. The courts below[3] were quite clear, in arranging California's jurisprudence for the future, that declaratory and injunctive relief remain with full vigor in a proper case, to remedy illegal government land use regulation. (J.S. App. 12).

On the record before it, the California Supreme Court held that the Tiburon ordinance did not "deprive the landowner of substantially all reasonable use of his property." (J.S. App. 13). Therefore, the ordinance was lawful, and these appellants were not entitled to any relief, either damages or injunctive or declaratory relief.

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[2]Work, KO'd by Zoning: Who Pays?, National Law Journal (Jan. 28, 1980), p.1.

[3]The California Court of Appeal, in an opinion reproduced in neither the Jurisdictional Statement nor the Appendix to the briefs, affirmed the dismissal of the claim for declaratory relief, but reversed as to the dismissal of the damages claim. 80 Cal.App.3d 225, 145 Cal.Rptr. 470 (1978).

In any event, the Court said, mandamus or declaratory relief would provide sufficient remedy against any illegal government action in this or other cases. (J.S. App. 12). Therefore, the "chilling effect" of an inverse condemnation remedy "upon the exercise of police regulatory powers at a local level" (*Id.* 13) was both unnecessary to the Agins and excessively intrusive of the City of Tiburon's planning and zoning powers.

While appellants' Jurisdictional Statement raises questions related principally to the appropriateness of a damages remedy in the abstract, the Statement does ask this Court to reweigh the facts (J.S. 4, Question 5) after three courts below have done so adversely to the Agins. Moreover, the Agins, having declined to amend their complaint, when permitted to do so, to allege the facts tending to show "the unreasonable restriction of . . . the use and enjoyment of their property" (App. 12), now also urge this Court to order a factual inquiry "whether the regulated property is in fact economically or physically capable of being put to uses ostensibly permitted by the regulation" (J.S. 4, Question 3).

ARGUMENT

Appellants admit that "allegations of takings give rise to issues of fact" (Br. 9; see also *Id.* 13), but urge that it was error for the Court below to conclude "that the taking power is exercised either properly or wrongfully, and . . . that it is only in the former case that 'just compensation' is awarded." (Br. 18). Rather, the appellants recommend the damages claim in this case as a paradigm "incentive[ ] to local governmental entities[ ]" through its prayer that the government "pay" for the "consequences of [its] own informed

decisionmaking." (Br. 40) (mutatis mutandis).

At the threshold, it is not necessary for this Court to decide whether each state court system may—or must—entertain damages suits in inverse condemnation. The finding of three courts below was that the Tiburon ordinance did not effect a "taking" of the Agins' property. This Court normally does not sit to reweigh concurrent findings. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) (concurrent findings of two courts below). Unless the concurrent findings of three courts below are disturbed here, the availability of an inverse condemnation remedy of damages for government regulation "taking" the value of land, is not fairly presented for decision, since there was no "taking" in this case.

Nonetheless, for the reasons set forth below, Amicus would urge the Court not to disturb the conclusions of the California Supreme Court, even if any opportunity to do so were fairly presented.

I.

THE DEMAND FOR GOOD LAND USE REGULATION SUPPORTS THE ELIMINATION OF INVERSE CONDEMNATION AS A REMEDY.

The decision by the California Supreme Court below to clarify the unavailability of inverse condemnation was based on the belief that this remedy is both inappropriate and undesirable in light of California's need for good land use regulation. In particular, the Court wished, first of all, to preserve flexibility in community planning and, second, to remove the inhibiting effect of an inadvertent expenditure of public funds which would result from the enactment of an

invalid regulation. These same policies are applicable to all local entities exercising land use decisions in the United States.

A. THE THREAT OF SUITS FOR DAMAGES UNDER INVERSE CONDEMNATION WOULD DETER EFFICIENT LAND USE PLANNING.

Municipalities have traditionally been authorized to exercise the police power to promote the public health, safety and general welfare. A municipality must be free to exercise this authority in the form of zoning regulations without incurring monetary liability should exercise of that authority later prove erroneous. Otherwise, necessary public action might not be taken. Comment, "Takings" under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 Sw.L.J. 723 (1976).

Under the rule appellants here suggest, a municipality would be compelled to enforce all ordinances at its own financial peril until their validity was judicially determined. See, e.g., *Ellis* v. *City of West University Place*, 141 Tex. 608, 175 S.W.2d 396 (1943); Hall, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 Hastings L.J. 1569, 1597 (1977). Commentators judge this to be an unsound result, since a municipality should not be inhibited in taking needed public action by fear of excessive liability where the limit of the police power is at issue. Cabaniss, Inverse Condemnation in Texas—Exploring the Serbonian Bog, 44 Tex.L.Rev. 1584, 1600 (1966).

The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action, would

have a chilling effect on governmental experimentation in land use control. This inhibition would most severely affect rapidly growing communities, those that most need innovative land use control, yet are least able to risk incurring such liability. Beuscher, Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation, 1 Urb.L.Ann. 1,12 (1968); Comment, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan.L.Rev. 1438, 1450 (1974); Hall, *supra*, at 1597. In a rapidly developing community, it is essential that development be directed before it takes place, as undesirable development can be redirected later only at a much greater cost to landowners. The deleterious consequences of haphazard community growth are recognized by the courts as one reason inverse condemnation should not be available to challenge land use regulations. See, *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal.3d 110, 120, 514 P.2d 111, 117, 109 Cal.Rptr. 799, 805 (1973).

The police power is an elastic power. Regulations are sustained under the complex conditions of today which, but a short time ago, might have been condemned as arbitrary and unreasonable. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926). See, also, *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

The California Supreme Court weighed carefully this diversity across time, as well as the geographical diversity among state systems of jurisprudence. For example, the Court considered the likelihood of a voter initiative "inadvertently" triggering an award of damages in inverse condemnation. (J.S.App. 12). Direct citizen lawmaking, through the initiative and in other forms, is more prevalent in California than in other states. The accommodation of the

Court below to this reality should be given deference by this Court, in any case. This is especially so here, where the nationwide rule urged by appellants would not even give them relief, on the record of this case, since there was no "taking" of their land.

B. EXCESSIVE FINANCIAL PRESSURE WOULD BE EXERTED UPON MUNICIPALITIES BY EVEN THE THREAT OF FRIVOLOUS INVERSE CONDEMNATION LITIGATION.

The fears articulated above are present even where the claim of the landowner of the invalidity of the government land use regulation is meritorious, and where the landowner seeks principally relief from the regulation. On the record of this case, neither circumstance is present.

The Court below held that the Tiburon ordinance was valid and did not deprive the Agins of the use of their land.

The trial court below gave the Agins leave to amend that part of their complaint seeking declaratory and injunctive relief, even while dismissing outright the claim for damages. The Agins have not amended, as the Court below found, and as they admit. (Br. 8). They do not seek relief from Tiburon's land use regulation, merely an award of money to accompany its exercise.

The fact which brings the Amicus before the Court is that such a preference for damages, rather than for lawfully corrected government regulation, is common in actions against local governments through the nation.

Real dangers would be involved in a proposal to force municipalities to compensate landowners in inverse condemnation for losses claimed to result from zoning restrictions. If a large area of land is involved in the zoning

regulation, disgruntled landowners could combine and bring so many inverse condemnation suits that a municipality would be financially unable to make the necessary payments. Comment, "Takings" under the Police Power, *supra*, at 738. Furthermore, with such an arrangement in effect, in an area likely to undergo rapid development, this will serve as an open invitation to a few developers to combine in bringing inverse condemnation suits, thus breaking the whole scheme of land use controls in the area. 5 Williams, American Land Planning Law, §159.18, at 386 (1975).

The chilling effect of extending inverse condemnation to zoning actions and paying damages with public funds is very real, as evidenced by the claims brought against many municipalities. Among them are claims in inverse condemnation for approximately $85 million against Fremont, California, based on its general plan, and for over $40 million against Palo Alto, California, for rezoning to less dense uses. Brief of Amici Curiae for the City of Cerritos at 25, *HFH, Ltd.* v. *Superior Court*, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1965). In fact, in an action brought by just one landowner challenging the Palo Alto downzoning, the complaint sought compensation in the sum of $4 million, plus costs, interest and fees. *Eldridge* v. *City of Palo Alto*, 57 Cal.App.3d 637, 129 Cal.Rptr. 575, 590, n.1 (1976) (noted in dissent of Sims, J.) (disapproved in *Agins* below. (J.S. App. 6)).

In the instant case, the Agins seek $2 million in damages from a small city with a population of only 6,000.

It has also been noted that the greater availability of attorney fees in inverse condemnation actions, as compared to the traditional forms of relief, would further encourage such litigation against municipalities. Work, KO'd by Zoning: Who Pays?, National Law Journal (Jan. 28, 1980),

p.9. Such fears are reinforced by the recent appearance of legal articles aimed at assisting plaintiffs' attorneys in preparing inverse condemnation challenges to zoning restrictions. Kanner, The Consequences of Taking Property by Regulation, 24 Prac.Law. (No.3) 65 (1978).

An action for inverse condemnation damages has the potential—exercised on the record of this case—to serve not as a claim for relief, but as an attempt to extort action or inaction from local government zoning and planning authorities, whether or not such action furthers the general welfare.

By insisting on their claim for damages and abandoning their claim for declaratory (or injunctive) relief, the Agins urge a rule which will defeat rational land use planning. The California Supreme Court below described the analysis and "weighing of costs and benefits" (J.S. App. 11) attending the formulation and implementation of the general land use plan required by state law. (J.S. App. 2). Under that procedure, the Agins had an opportunity to contribute their views— and their facts—to the cost-benefit calculus for the entire region. Under the declaratory and injunctive actions left available to meritorious plaintiffs by the decision below, litigants may seek a judicial evaluation of the calculus, again on a comprehensive basis.

Under inverse condemnation, however, the Agins have sought, not a new plan for Tiburon, but a special arrangement covering themselves alone. Moreover, the special arrangement is not in the nature of a variance or special exception, but consists of compensation solely. The Agins would be quite satisfied if the City never changed its plan and land use ordinance—or the Agins' treatment under them—so long as the City purchases the Agins' land at the Agins' price.

The Agins are candid in their brief to admit a desire to

discourage any government action which will relieve them of the effects of the ordinance of which they complain, and correspondingly diminish their damage claim. (Br. 38).

A municipality should not be threatened through inverse condemnation to make unwise and *ad hoc* zoning changes. Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis.L.Rev. 3, 48. Where the municipality has impaired the rights of private property by regulation unattended by physical invasion and unconnected with any public improvement, the landowner may not elect to ratify an unconstitutional action of the municipality and recover damages as for a compensable taking. Cabaniss, *supra*, at 1602. A public policy encouraging the purchase of landowner acceptance of what would traditionally be unauthorized regulation is misconceived. The possibility of compensation inherent in such a policy appears to invite nonparticipation by landowners in the legislative process rather than encourage landowners to follow that process closely to guard against arbitrary exercises of the police power. Hall, *supra*, at 1598; Note, 66 Harv.L.Rev. 1134, 1135 (1953).

If inverse condemnation is available to zoning challengers, that cause of action could be extended to test the validity of any governmental regulation, whether the regulation affected tangible or intangible property. There is no logical reason to limit the availability of the remedy under inverse condemnation to invalid regulations affecting real estate, as excessive regulation of any other property interest could have as great an economic impact on an individual as regulation of real estate. Expanded notions of property, see, e.g., *United States* v. *Finn*, 127 F.Supp. 158, 167 (S.D.Cal. 1954), *modified*, 239 F.2d 679 (9th Cir. 1956); *Sutfin* v. *State*, 261 Cal.App.2d 50, 67 Cal.Rptr. 665, 666 (1968); Comment,

38 Wash.L.Rev. 607 (1973), coupled with the principle that regulations restricting the use of property beyond a certain point become takings, suggest the availability of inverse condemnation actions to challenge the validity of governmental regulation of any property interest.

II.

THE FIFTH AMENDMENT DOES NOT REQUIRE INVERSE CONDEMNATION AS A REMEDY.

The Fifth Amendment is designed to protect the rights of landowners; it does not, however, require inverse condemnation as a remedy to protect those rights. The key, then, to affording to the landowner the protections guaranteed by the Fifth Amendment is not the availability of inverse condemnation, but the availability of adequate remedies. In this case the California Supreme Court specifically reaffirmed the availability of both mandamus and declatory relief as wholly adequate remedies and thus assured that the rights of landowners under the Fifth Amendment will continue to receive protection in the courts of California. This Court, as a matter of sound judicial policy, should accept this view.

California is not alone in recognizing the need for flexible land use planning; New York has experienced some of the same need. In *Fred F. French Investing Co., Inc.* v. *City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed*, 429 U.S. 990 (1976), New York's highest court chose invalidation of a zoning amendment, rather than an award of monetary damages, as the appropriate remedy for an invalid regulation not associated with

any physical invasion or dedication of the property for public use.

Invalidation is not illusory as a judicial remedy. California courts, federal courts and courts from other states, in addition to New York, have shown no hesitation in invalidating land use actions taken by public entities where an excessive exercise of the police power or other arbitrary action has been involved. E.g., *State* v. *Superior Court* (*Veta*), 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974); *Scrutton* v. *County of Sacramento*, 275 Cal.App.2d 412, 79 Cal.Rptr. 872 (1969); *Union Oil Co. of California* v. *Morton*, 512 F.2d 743 (9th Cir. 1975); *Gaebel* v. *Thornbury Township*, 8 Pa.Commw. 399, 303 A.2d 57 (1973); *Mailman Dev. Corp.* v. *City of Hollywood*, 386 So.2d 614 (Fla. 1974). As the California Supreme Court has held here, judicial invalidation of improper land use regulatory action strikes the proper balance between the needs of public entities to protect the public interest and the rights of private property owners; the remedy of forced purchase through inverse condemnation is not appropriate.

Regardless of the form of an action by a landowner, i.e., whether it be declaratory relief or mandamus, constitutional standards will have to be satisfied in order for the land use regulatory measure to be sustained.

All of these policy considerations are native to all the states of the Union and especially to those which have enacted comprehensive systems of statutes on land use planning, open-space preservation, zoning and related matters. Cities and counties, within the last few years, have enacted several land use ordinances or regulations which have been upheld by the courts to help preserve flood plain zones (*Turnpike Realty Co.* v. *Town of Dedham*, 362

Mass.221, 284 N.E.2d 891, 900 (1972)); wetlands (*Sibson* v. *State*, 115 N.H.124, 336 A.2d 239 (1975)); areas for parks (*Associated Home Bldrs.* v. *City of Walnut Creek*, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 (1971)); coastlines (*State* v. *Superior Court (Veta), supra*); lakeshore areas (*Just* v. *Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972)); agricultural uses (*Gisler* v. *County of Madera*, 38 Cal. App.3d 303, 112 Cal.Rptr. 919 (1974)); the San Francisco Bay (*Candlestick Properties, Inc.* v. *San Francisco Bay Conservation Comm'n.*, 11 Cal.App.3d 557, 89 Cal.Rptr. 897 (1970)).

None of these policies stands in clear conflict with any federal statute, financial program or policy in this field. On the contrary, the federal government has traditionally recognized the autonomy of the states and their political subdivisions in controlling the use and development of land. See, generally, *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). It would be highly inappropriate for this or any federal Court to interfere with the policy decision made by the California Supreme Court below absent any discernible federal constitutional interest.

CONCLUSION

The decision of the California Supreme Court does not place in jeopardy any fundamental constitutional right of owners of private property. The Fifth Amendment does not enshrine inverse condemnation as a remedy to protect the rights of private landowners. The California Supreme Court has protected those rights by leaving to private property owners appropriate judicial remedies to invalidate excessive

police power regulations. These are the remedies the Agins eschewed in favor of damages.

For the foregoing reasons, the Amicus NIMLO respectfully urges that the decision of the California Supreme Court be affirmed.

Respectfully submitted,

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